1995

Dale P. Holt v. Vickie L. Holt : Reply Brief

Utah Court of Appeals

Ronald C. Barker, David Paul White; Attorneys for Appellants
Ann L. Wassermann, E. Paul Wood, Littlefield & Peterson; Attorneys for Appellee.

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

---ooOoo---

DALE P. HOLT,	)	**APPENDIX TO REPLY BRIEF OF APPELLANT**
Plaintiff, Appellee and cross-Appellant	)	Docket No. 950169-CA
v.	)	District Court No. 93470055 DA
VICKIE L. HOLT,	)	Priority Classification 15
Defendant, Appellant and cross-Appellee.	)	
	)	

---ooOoo---

APPEAL FROM JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

THE HONORABLE W. BRENT WEST PRESIDING

Attorney for Respondent & Cross-Appellant:

ANN L. WASSERMAN #A3395
E. Paul Wood #3537
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone (801) 531-0435

Attorneys for Appellants:

RONALD C. BARKER, #0208
2870 South State Street
Salt Lake City, Utah 84115
Telephone (801) 486-9636

DAVID PAUL WHITE, # 3441
5278 Pinemont Dr. #A200
Murray, Utah 84123
Telephone (801) 266-4114

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

---ooOoo---

DALE P. HOLT,	)	**APPENDIX TO REPLY BRIEF OF APPELLANT**
Plaintiff, Appellee and cross-Appellant	)	Docket No. 950169-CA
v.	)	District Court No. 93470055 DA
VICKIE L. HOLT,	)	Priority Classification 15
Defendant, Appellant and cross-Appellee.	)	
	)	

---ooOoo---

APPEAL FROM JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

THE HONORABLE W. BRENT WEST PRESIDING

Attorney for Respondent & Cross-Appellant:

ANN L. WASSERMAN #A3395
E. Paul Wood #3537
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone (801) 531-0435

Attorneys for Appellants:

RONALD C. BARKER, #0208
2870 South State Street
Salt Lake City, Utah 84115
Telephone (801) 486-9636

DAVID PAUL WHITE, # 3441
5278 Pinemont Dr. #A200
Murray, Utah 84123
Telephone (801) 266-4114

APPENDIX TABLE OF CONTENTS

Tab P

EXHIBIT 9

CODALE ELECTRIC
HYPOTHETICAL LIQUIDATION SCHEDULE
AS OF JANUARY 31, 1994
(in $000's)

ASSETS	Book Value	Liquidation Value
CASH (1)	326.4	326.4
ACCOUNTS RECEIVABLE (2)	4,711.6	4,476.0
INVENTORIES (3)	2,270.0	2,366.9
OTHER CURRENT ASSETS (4)	325.8	325.8
PROPERTY & EQUIPMENT (5)	906.6	906.6
OTHER ASSETS (6)	238.1	238.1
INTANGIBLE ASSETS (7)	347.2	0.0
TOTAL ASSETS	9,125.7	
TOTAL ESTIMATED REALIZABLE VALUE OF ASSETS		8,639.8
LIABILITIES AND EQUITY		
CURRENT LIABILITIES (8)	5,230.3	5,230.3
LONG-TERM LIABILITIES (8)	602.0	602.0
STOCKHOLDERS' EQUITY	3,293.4	0.0
TOTAL LIABILITIES & STOCKHOLDERS' EQUITY	9,125.7	
TOTAL ESTIMATED REALIZABLE VALUE OF LIABILITIES		5,832.3
ESTIMATED LIQUIDATION VALUE		2,807.5

Notes: See following page

Tab Q

David Paul White, #3441
Attorney for Defendant & Appellant
5278 Pinemont Drive, #A-200
Murray, Utah 84123
Telephone (801) 266-4114

Ronald C. Barker, #0208
Co-Counsel for Defendant & Appellant
2870 South State Street
Salt Lake City, Utah 84115
Telephone (801) 486-9636

Attorneys for defendant - Appellant

IN THE UTAH COURT OF APPEALS

---ooOoo---

DALE P. HOLT, Plaintiff, Appellee, and Cross-Appellant, v. VICKIE L. HOLT, Defendant, Appellant, and Cross-Appellee.	RESPONSE TO APPELLEE'S MOTION TO STRIKE PORTIONS OF APPELLANT'S BRIEF Case No. 950169-CA

I

INTRODUCTION

1. **Response to URCP 23 Motion to Strike.** The Appellant, Vickie L. Holt ("**WIFE**"), responds to Appellee Dale P. Holt's (**HUSBAND**") URAP 23 Motion to Strike Portion of Appellant's Brief as follows:

II

RESPONSE TO "FACTUAL BACKGROUND"

2. **Husband failed to mention hearing of Wife's URCP 59 Motion or the resulting order.** Husband's "Factual Background for this Motion" is incomplete, in that he has omitted other important proceedings by the trial court. Husband's failure to consider the 2/14/95 hearing or the resulting Order[1] probably explains why he filed a a non-meritorious motion to strike, and why he erroneously asserted therein that the matters sought to be struck from Wife's brief had not been considered by the trial court,[2] when they had been argued and ruled upon.

3. **Husband's omissions.** Husband's omissions in his "Factual Background" summary include the following:

(a) **Failure to include 2/4/95 Order and Judgment.** Husband's summary failed to mention the Court's 2/4/95 (ten page) "Order and Judgment" wherein the Court made extensive findings and orders concerning custody, visitation, alimony, child support, insurance, distribution of assets, etc. However, that omission does not substantially affect his Motion to Strike.

---

[1] See discussion in ¶ 3(b) below.

[2] Husband incorrectly alleges that "A significant portion of Mrs. Hot's Brief contains references to evidence submitted post-trial and not considered by the Court when making its ruling." [See page 1 of Husband's Motion to Strike Portion of Appellant's Brief"].

(b) **Failure to include 2/14/95 hearing and 3-21-95 "Order in re: Defendant's Motion to Correct Judgment, for a New Trial, etc."** Husband's summary of proceedings failed to mention the 2/14/95 hearing and oral argument[3] re Wife's URCP 59 Motion or the resulting 3/21/95 "Order in re: Defendant's Motion to Correct Judgment, for a New Trial, etc., which denied Wife's URCP 59 Motion.[4] Husband's failure to include that Order is curious, since in ¶ 14 Husband's memorandum he refers to the Court's 3/21/95 "Order on Post Trial Motions",[5] says that a copy is attached as **Ex. "C"**, but instead his **Ex. "C"** contains a copy of the omitted Court 3/21/95 Order denying Wife's URCP 59 Motion.

III

ARGUMENT

Trial Court Considered Data Sought to be Struck

4. **Husband's argument misstates the facts.** Counsel for Husband argues that since Wife's URCP 59 Motion and supporting

---

[3] R. 532 & 540.

[4] R. 540-541 and **Ex. "C"** to Husband's Motion to Strike.

[5] R. 534-539.

affidavits were filed after the 11/5/94 hearing,[6] that for some unexplained reason they must be:

> "evidence . . . which was **not considered by the trial court in its rulings,** which under Utah law should not be considered on appeal."[7] (emphasis added)

and that they are allegedly are

> "**outside the scope of evidence.**"[8] (Emphasis added)

Counsel for Husband is in error. The arguments in Wife's URCP 59 Motion, supporting affidavits, etc. ***were*** "considered by the Court"

---

[6] Wife's URCP 59 Motion [R. 400-502, 505-513 & 528-531] sought relief and was based upon various grounds as follows:

1. URCP 59(a)(3) [accident or surprise]; URCP 59(a)(4) [newly discovered evidence]; URCP 59(a)(5) [newly discovered evidence]; URCP 59)a)(6) [insufficiency of evidence]; and URCP 59(a)(7) [error in law].

2. URCP 59(e) [Motion to Alter or Amend Judgment and Orders].

3. Incorporated by reference Wife's 11/3/94 "Defendant's Memorandum re Motion to Correct Ruling and to Distribute Additional Assets or for a New trial," a copy of which was attached thereto as **Ex. #1**.

4. Argued that at 11/4/94 hearing the Court declined to hear arguments raised by Wife's 11/3/94 Memorandum and invited Wife to bring those matters before the Court after entry of Findings, Conclusions and Order. Wife moved the Court for an order vacating the 11/4/94 "Order on Post Trial Motions" to the extent that it purported to deny Wife's 11/3/94 Motions.

5. Attached the affidavits of Paul Shields and Robert Hunter and referred to trial testimony and exhibits.

6. Stated that the motion pertained to Findings, Conclusion, Order and Judgement, Order on Post Trial Motions; and generally to orders and decisions pertaining to distribution of assets, payment of taxes, award of alimony, child support, payment of expert witness fees, attorney fees, costs, life insurance, mandatory withholding and other orders pertaining to financial matters.

[7] Page 1 of Husband's Memorandum.

[8] See second introductory ¶ in Exhibit "A", page 6 to Husband's Motion to Strike."

in Making its 3/21/95 Order, and are not "outside the scope of evidence" as alleged.

5. **Husband's argument ignores 2/14/95 hearing and 3/21/95 Order.** Husband's argument ignores the 2/14/95 hearing and the Court's resulting 3/21/95 order,[9] improperly asks the Court to strike reference to and to disregard the proceedings which occurred after the November 5, 1994 hearing,[10] and improperly seeks to limit the record on appeal to the trial and the 11/5/94 hearing. Contrary to Husband's argument, the trial court did hear oral argument of Wife's URCP 59 Motion and entered an order denying that motion.[11]

6. **Wife appealed from denial of her URCP 59 Motion.** Wife's appeal specifically includes an appeal from the Court's post-trial orders.[12] As indicated above, counsel for Husband incorrectly states that the potions of Wife's brief which he is asking the Court to strike were allegedly not considered by the trial Court.[13] He is wrong. Wife is entitled to appeal from the Court's denial of

---

[9] Copy attached as **Ex. "C"** to Husband's Motion to Strike.

[10] See second ¶ of Exhibit "A" to Husband's Motion to Strike, wherein he states:
All reference to the "Record ("R") after record page 400 are outside the scope of evidence heard at trial or in the November 5, 1994 Hearing."

[11] The Court's 3/21/95 Order recites that Wife's URCP 59 Motion and errata thereto were argued to the Court by counsel for the parties, and the Court's ruling thereon was reduced to writing in that Order, which is entitled **"Order in re: Defendant's Motion to Correct Judgment, for a Ne Trial, etc."**

[12] See content of the Amended Notice of Appeal, R. 548-549.

[13] See footnote #2 above.

her URCP 59 Motion. Citations to the record in support of that portion of the appeal are proper and appropriate and should not be struck.

7. **Cases re striking briefs.** As discussed below, the cases cited by counsel for Husband do not support his Motion to Strike.

(a) ***Maughn v. Maughn.*** In *Maughn v. Maughn,*[14] cited by Husband, the Court of Appeals properly struck documents not in the record and which were presented for the first time with a reply brief. Unlike *Maughn,* in the present case Wife's URCP 59 Motion, affidavits, etc. were presented to and ruled upon by the trial court.

(b) ***Territorial Savings & Loan Association v. Baird.*** In *Territorial Savings & Loan Association v. Baird,*[15] a party sought to supplement the record on appeal with a deposition that had not been submitted to the trial court in connection with a Motion for Summary Judgment. The Court of Appeals properly held that "evidence not available to the trial judge cannot be added to the record on Appeal" (citation omitted). As indicated above, in the present case the evidence sought to be struck was not only available to the trial court, but the trial court heard oral

---

[14] *Maughn v. Maughn* (Utah Ct.App. 1989) 770 P.2d 156.

[15] *Territorial Savings & Loan Association v. Baird* (Utah Ct.App. 1989) 781 P.2d 452.

argument thereon and signed a written order denying that motion. *Baird, supra.* supports Wife's argument that since that evidence was "available to the trial judge" it can properly be considered on appeal.

(c) ***Chapman v. Chapman.*** In *Chapman v. Chapman*[16] the Supreme Court properly refused to consider answers to interrogatories and requests for admissions attached as an addendum to appellant's brief, but which were "outside the record." *Chapman* does not support Husband's argument since Wife's URCP 59 Motion and supporting affidavits, etc. were not "outside the record" but are an integral part of the record.

(d) ***Covert Copier Painting v. Van Leeuwen.*** In *Covert Copier Painting v. Van Leeuwen* (Utah Ct.App. 1990) 801 P.2d 163, 170, the Utah Court of Appeals properly refused to consider an interrogatory answer and an affidavit filed in connection with an earlier motion, where:

> "Neither this affidavit nor the interrogatories were included in the materials **supplied to the judge** when he decided Van Leeuwen's Motion for Summary Judgment. (Emphasis added).

---

[16] *Chapman v. Chapman,* (Utah 1986), 728 P.2d 121, 123.

Unlike *Covert, supra,* as discussed above, in the present case the affidavits and other documents sought to be struck ***were*** "included in the materials supplied to the judge."

(e) ***Jackson v. Remington Park, Inc.*** In *Jackson v. Remington Park, Inc.* (Okl. App. 1994) 874 P.2d 814, the Court properly held that an affidavit filed the day after the Court's ruling was not evidence before the court at the time of the ruling on the summary judgment motion and was not properly part of the record on appeal. As discussed above, in our case Wife's URCP 59 Motion, supporting affidavits, etc. were before the Court, were ruled upon and are properly part of the record on appeal from the trial court's denial of Wife's URCP 59 Motion. Similarly, in ***Moon Lake Elec. v. Ultra Systems W. Const.*** (Utah Ct.App. 1988) 767 P.2d 125 at 128 the Court of Appeals properly rejected an argument that a summary judgment should be reversed based upon untimely affidavits and unpublished depositions.

8. Citations to legal authorities in Wife's Appendix which Husband seeks to have struck. Without supporting argument, Husband's Motion to Strike[17] improperly seeks to strike Wife's URAP 24(11)(A) legal authorities. URAP 24(11)(A) provides for inclusion in an appendix copies of statutes, rules, regulations, etc. of

[17] See Exhibit "A" to Motion to Strike, page 6.

central importance which are not reproduced verbatim in the brief. In compliance with that rule, Wife included copies of such items in her addendum, which Husband now seeks to strike for some unexplained reason. Authorities and materials included in Wife's Appendix are summarized in the footnote.[18] Those materials have been included pursuant to URAP 24(11)(A) and for the convenience of the Court and should not be struck.

9. **Shield's affidavit.** Paul Shield's[19] affidavit[20] analyzes the financial consequences of the Court's division of assets, etc. Among other things, he furnished computations, charts and graphs to demonstrate that Husband received substantially more than ½ of the

---

[18] URAP materials included in Wife's Appendix, which Husband seeks to strike, include the following:

Appendix C - Copy of 26 USCS § 1041 - Federal tax statute re taxability of transfers of property between spouses or incident to divorce.

Appendix D - Copy of:

(a) Commerce Clearing House Income Taxes ¶ 32,70, pages 55,278 through 55,285; and

(b) IRS Temporary Regulations concerning 26 USCS § 1041.

Appendix E - Copy of USCS § 301 re tax consequence from distribution of property.

Appendix F - Copy of IRS rules re distributions of money and property.

Appendix G - Copy of National Office Technical Advise Memorandum re taxability of distributions in redemption of stock and of transfers between spouses or incident to divorce.

Appendix H - Copy of Article from Journal of Corporate Taxation which discusses the Ninth Circuit *Arnes* case and subsequent Tax Court cases re taxability of redemptions of stock incident to a divorce.

[19] Mr. Paul Shields is a Certified Public Accountant employed by Neilson Elggren Durkin & Co.

[20] **Appendix B** - Copy of Paul Shields 2/1/95 Affidavit and attachments thereto. R. 476-493.

marital assets, even based upon the Court's having charged Husband only salvage value for the marital business, to demonstrate the inequality in the Court's division of martial assets, the inequality of resulting earnings, etc. Until the Court made a decision no such affidavit, computations, projections, etc. could be made. Shield's affidavit and supporting materials were properly filed in support of Wife's URCP 59 Motion, and should not be struck. They could not have been filed in connection with the 11/5/94 hearing since the Court had not yet made a decision to which he could address his affidavit. Mr. Shield's affidavit and supporting materials were before the Court when it made its 3/21/95 order denying Wife's URCP 59 Motion.[21]

10. **Hunter's affidavit.** Robert D. Hunter's affidavit[22] analyzes the income tax consequences of the Court's order re asset distribution, and presented a proposal which, if it had been adopted by the Court, would have decreased the tax consequences from about $440,000 using the Court's method of dividing marital assets, to about $30,000 if his proposed alternative asset distribution method were used. Among other things, Mr. Hunter furnished computations, charts and graphs to demonstrate the tax consequences under different scenarios. Until the Court made a

---

[21] **Appendix B** - Copy of Paul Shields 2/1/95 Affidavit and attachments thereto. R. 476-493.

[22] **Appendix I** - Copy of Robert Hunter's 2/6/95 Affidavit and attachments thereto R. 495-502.

decision no such affidavit, computations, projections, etc. could be made. Hunter's affidavit and supporting materials were properly filed in support of Wife's URCP 59 Motion, and should not be struck. They could not have been filed in connection with the 11/5/94 hearing since the Court had not yet made a decision to which he could address his affidavit. Mr. Shield's affidavit and supporting materials were before the Court when it made its 3/21/95 order denying Wife's URCP 59 Motion.[23]

11. **Appendix O is a summary of plaintiff's trial exhibit.** The first five lines of Appendix O is a summary of income projections for the family business made by Husband's expert, and the next five lines are an additional five year projection made therefrom.[24] It is difficult to understand Husband's argument as to why a summary of his own trial exhibit should be struck.

12. **Arguments and footnotes.** Without description, argument or explanation, Husband asks the Court to Strike about nineteen references and arguments in Wife's brief.[25] Husband's Motion to Strike is too vague and indefinite to permit a meaningful response.

---

[23] R. 495-502.

[24] The first five lines on **Appendix O** are summarized from Husband's Expert's Exhibit #3 to Husband's trial exhibit #21, which project income from the family business forward for five years through 1999. Based thereon Wife's expert, Shields, carried that projection forward another five years, through 2004, as shown on lines 6 through 10.

[25] See Exhibit "A", page 6 to Husband's Motion to Strike, where Husband supplies a laundry list of paragraphs in Wife's brief, with related footnotes, without further explanation.

To the extent, if at all, that Husband seeks to strike arguments or footnotes based upon his incorrect argument that Wife's URCP 59 Motion and the supporting affidavits by Shields and Hunter were allegedly not available to or were allegedly not considered by the Court in making its ruling, Husband's motion to strike arguments and footnotes should be denied because, as discussed above, that motion and those affidavit were not only available but were argued and ruled upon by the Court.

IV

CONCLUSION

Husband's Motion to Strike is without merit. It should be summarily denied and Wife should be awarded her attorney fees incurred in connection with that motion.

Dated June 15, 1996.

Ronald C. Barker, attorney for Appellant Vickie Holt

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be mailed the 15th day of June, 1996, to the following persons at the addresses indicated:

E. Paul Wood, Esq.
Ann L. Wasserman, Esq.
426 South 500 East
Salt Lake City, Utah 84102.

Ronald C. Barker

Tab R

E. PAUL WOOD - 3537
ANN L. WASSERMANN - A3395
LITTLEFIELD & PETERSON
Attorneys for Dale P. Holt,
Appellee and Cross Appellant
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

IN THE COURT OF APPEAL

STATE OF UTAH

----------oo0oo----------

DALE P. HOLT,	:	**REPLY TO APPELLANT VICKIE L. HOLT'S RESPONSE TO MOTION TO STRIKE PORTIONS OF APPELLANT'S BRIEF**
Plaintiff, Appellee and Cross Appellant,	:	
v.	:	
VICKIE L. HOLT,	:	
Defendant, Appellant and Cross Appellee	:	Case No. 950169-CA Judge

----------oo0oo----------

Appellant, Vickie L. Holt's Response to Appellee Dale P. Holt's Motion to Strike Portions of Vickie Holt's Appeal Brief entirely misinterprets the primary thrust of the Motion to Strike and admits that the evidence which Dale Holt seeks to strike from the Appeal Brief was not admitted into evidence before the trial court when the trial court entered its Findings of Fact, Conclusions of Law and Judgment on January 4, 1995.

1. Dale Holt moves this Court to strike portions of Vickie Holt's Appeal Brief. The basis of the Motion is that Vickie Holt bases segments of her arguments contained in her Appeal Brief

that the Court's Findings of Fact, Conclusions of Law and Judgment entered January 4, 1995 should be set aside and are erroneous, on evidence in the form of Affidavits, Articles and Summaries filed with Vickie Holt's Rule 59 Motion on February 2, 1995. Mr. Holt's point in making this Motion is very simple: the trial court did not have the evidence before it on January 4, 1995 when it ruled on the merits of the trial held June 13-15, 1994. Since the evidence was not before the trial court when it made its decision, the evidence cannot be used as a basis for finding that the Court's Findings of Fact, Conclusions of Law or Judgment are in error.

2. Vickie Holt admits that the Affidavits of Paul Shields and Robert Hunter and the various summaries and exhibits of which Mr. Holt complains were submitted with the Rule 59 Motion subsequent to the Court's January 4, 1995 ruling. (Vickie Holt Response, section 5, 9, 10 and 11).

3. In her Response, Vickie Holt erroneously attempts to bootstrap use of the subsequently filed evidence as a basis for appealing the Court's January 4, 1995 Findings, Conclusion and Judgment. Mrs. Holt asserts that since she has appealed the trial court's denial of her Rule 59 Motion, the evidence submitted in connection with the Rule 59 Motion was "before the court" and "not outside of the scope of evidence", (Vickie Holt's Response, section 4).

First, while Mrs. Holt may have appealed from the trial court's denial of her Rule 59 Motion in the sense that she makes a statement to that effect in her Amended Notice of Appeal, Mrs. Holt's Appeal Brief is totally barren of any reference to appealing from the Rule 59 Motion. At page 1, section I, "Jurisdiction", Mrs. Holt states:

> This is appeal from a final alimony, child support and marital assets distribution order as part of a divorce entered by the Second Judicial District Court. (Appeal Brief, p. 1)

At page 2, subsection II(b) of Mrs. Holt's Appeal Brief, she recites the issues which she is appealing, none of which includes denial of her Rule 59 Motion:

> The issues presented for review in wife's appeal are as follows:
>
> Distribution of Marital Estate
> Alimony and Child Support
> Witness Fees
> Wife's Attorney Fees
> Insufficient Findings

Finally at page 8, subsection 7 of Mrs. Holt's Appeal Brief, she recites in subparts (a) through (n) the "matters challenged by Appeal", none of which address denial of the Rule 59 Motion. There is simply no argument, case citation or standard submitted by Mrs. Holt on the issue of appealing denial of the Rule 59 Motion.

Second, even in the event Mrs. Holt's Appeal Brief appropriately argued denial of her Rule 59 Motion, the evidence submitted in connection with the Rule 59 Motion could only be considered by the Court of Appeals in connection therewith and not as a basis for setting aside the court's Findings of Fact or holding that the trial court committed error in the Conclusions of Law of Judgment.

CONCLUSION

The citations to portions of Mrs. Holt's Brief contained in Exhibit "A" to the Dale Holt's Motion to Strike all contain evidence which was submitted with Mrs. Holt's Rule 59 Motion which should be stricken from Mrs. Holt's Appeal Brief.

DATED this 20th day of June, 1996.

LITTLEFIELD & PETERSON

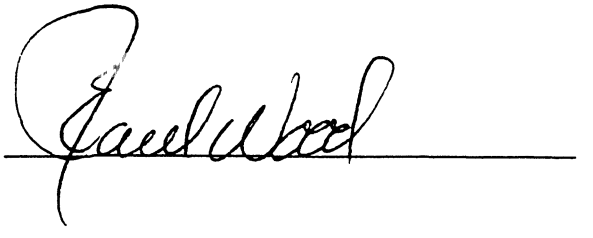
By: E. Paul Wood, Esq.
By: Ann L. Wassermann, Esq.
Attorneys for Dale P. Holt
Appellee and Cross Appellant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, a true copy of the foregoing, REPLY TO APPELLANT VICKIE L. HOLT'S RESPONSE TO MOTION TO STRIKE PORTIONS OF APPELLANT'S BRIEF, this 20th day of June, 1996, to:

RONALD C. BARKER
2870 South State Street
Salt Lake City, UT 84115-3692

DAVID PAUL WHITE
5278 Pinemont Drive, #A-200
Murray, Utah 84123



w6\holt.mem

Tab S

IN THE UTAH COURT OF APPEALS

---oc0oo---

Dale P. Holt, Plaintiff, Appellee, and Cross-appellant,	ORDER
v	Case No. 950169-CA
Vickie L. Holt, Defendant, Appellant, and Cross-appellee.	

This matter is before the court upon appellee's motion, filed May 24, 1996, to strike a portion of appellant's brief. On June 17, 1996, appellant filed a response to appellee's motion to strike, and on June 20, 1996, appellee filed a reply to appellant's response.

IT IS HEREBY ORDERED that appellee's motion to strike is denied. Appellant's second brief, as described in Rule 24(g), Utah R. App. P., shall be filed no later than 30 days from the date of this order.

Dated this 2nd day of July, 1996.

FOR THE COURT:

Norman H. Jackson, Judge

Appendix "S"

Tab T

PER CURIAM.

In August 1983, Rod Peterson, a motor home dealer, loaned a pickup truck to Ivan Perry Decker. Decker failed to return it. He was subsequently charged with grand theft, I.C. §§ 18-2403(1), 18-2407(1). After a jury trial, he was convicted. He now appeals, challenging only the sufficiency of the evidence to sustain the conviction. Specifically, he contends the evidence was *insufficient to prove that he "intended to* permanently deprive the victim of the use [or] benefit of the vehicle."[1] We affirm.

[1] Appellate review of the sufficiency of the evidence is limited in scope. A judgment of conviction, entered upon a jury verdict, will not be set aside where there is substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Filson,* 101 Idaho 381, 386, 613 *P.2d 938, 943 (1980). "[W]e are precluded* from substituting our judgment for that of the jury as to the credibility of witnesses, the weight of the testimony, and the reasonable inferences to be drawn from the evidence." *State v. Campbell,* 104 Idaho 705, 718-19, 662 P.2d 1149, 1162-63 (Ct. App.1983). Furthermore, we view the evidence in the light most favorable to the respondent. *State v. Fenley,* 103 Idaho 199, 203, 646 P.2d 441, 445 (Ct.App.1982).

[2] We have reviewed the evidence under these standards. The state's evidence shows that Decker wanted to purchase a motor home from Peterson but that a problem arose concerning credit approval from the bank. The problem could not be resolved until the next day. Because Decker was on foot, Peterson loaned him a pickup truck to be used overnight. Rather than returning the vehicle the next day, Decker drove it to Durango, Colorado, where he was eventually arrested. The jury reasonably could infer that Decker intended to deprive Peterson of the pickup.

The judgment of conviction is, therefore, affirmed.

1. Decker's argument, in so far as it presumes that theft requires intent to deprive the owner of his property "permanently," fails to take account of the modern language of I.C. § 18-2403 Decker was prosecuted under the modern statute.

Elizabeth Mary CARR,
Plaintiff-Respondent,

v.

Terry Arthur CARR,
Defendant-Appellant.

No. 15177.

Court of Appeals of Idaho.

May 31, 1985.

In divorce proceeding, magistrate ordered sale of community-owned business and ordered proceeds divided between parties, and husband appealed. The District Court, First Judicial District, Kootena County, Watt E. Prather, J., affirmed, and husband appealed. The Court of Appeals Walters, C.J., held that: (1) trial court could order husband to agree to noncompetition clause in sales agreement, thereby including goodwill in sale of business; (2) *truck stop, including its goodwill, was com*munity asset which should have been valued and distributed by magistrate; and (3) trial court was required to determine value received for goodwill of business and to determine whether unequal division of amount received for goodwill was appropriate.

Vacated and remanded.

Swanstrom, J., dissented in part and filed opinion.

1. Divorce ⇐286(1)

Issue of whether trial court could order husband to agree to noncompetition clause in sales agreement when family business was sold to facilitate property distribution in divorce proceeding did not become moot when husband signed noncompete provision, as husband agreed to sign such provision only to avoid further contempt orders.

2. *Divorce* ⇐*252.3(2)*

Unless there are compelling reasons to divide community assets unequally, division of community property in divorce proceeding should be substantially equal. I.C. § 32-712.

3. Divorce ⇐252.3(2)

Method by which community property is distributed in divorce proceeding is left to discretion of trial court, but ordinarily trial court should divide community property in such way as to give each spouse the *sole and immediate control of his or her* share of property. I.C. § 32-712.

4. Divorce ⇐252.3(5)

To give each spouse the immediate control of his or her share of community property distributed in divorce proceeding, trial court may provide for sale of community property so long as sale order does not amount to waste of community asset or provide that property be sold for less than it is worth.

5. Divorce ⇐269(2)

Trial court in divorce proceeding may enforce its orders regarding property distribution with contempt proceedings.

6. Divorce ⇐269(9)

Trial court is not precluded from issuing orders to effectuate property disposition decree where order, which might be enforced with contempt proceedings, does not direct payment of debt. Const. Art. 1, § 15.

7. Divorce ⇐252.3(5)

*In ordering sale of community busi*ness to effectuate property disposition in divorce action, trial court may require business' goodwill to be included in the sale.

8. Good Will ⇐4

Goodwill is property that can be sold

9. Husband and Wife ⇐249(2)

Goodwill of business owned by spouse may be community property, separate property or part community property and part separate property, depending on circumstances. I.C. § 32-903.

10. Divorce ⇐252.3(1)
Husband and Wife ⇐248½, 249(1), 250, 251

"Separate property" is all property owned by either spouse before marriage, and property acquired afterward by gift, bequest, devise, or descent; "community property" is all other property acquired after marriage by either spouse. I.C. §§ 32-903, 32-906.

See publication Words and Phrases for other judicial constructions and definitions.

11. Husband and Wife ⇐249(2)

To extent it is acquired through efforts of spouse during marriage, goodwill of community-owned business is community property. I.C. § 32-906.

12. Husband and Wife ⇐249(2)

Where spouses did not have interest in truck stop until after they were married and all their labor on behalf of business occurred during coverture, any goodwill value of business was community property which should have been valued and distributed upon divorce. I.C. §§ 32-903, 32-906.

13. Divorce ⇐252.3(5)

In ordering sale of community business truck stop to effectuate property disposition in divorce action, magistrate did not err by ordering husband to execute reasonable noncompetition agreement, thereby including the goodwill in sale of truck stop.

14. Good Will ⇐4

Goodwill of business is sold when seller agrees to noncompetition provision in sales agreement.

Appendix "I"

15. Divorce ⇐252.3(5)

When family owned business is sold to facilitate property division in divorce, trial court must consider unique character of goodwill along with statutory factors to determine whether goodwill asset should be divided equally; unique nature of goodwill, its sale by means of noncompetition clause, its varying importance to separate individuals of marital community, and effect of its sale on statutory factors may constitute compelling reasons to divide value received for goodwill unequally. I.C. § 32-712.

16. Divorce ⇐252.3(5)

In ordering sale of community business to effectuate property disposition in divorce action, trial court must determine value received for goodwill of business and must carefully consider statutory factors to determine whether unequal division of amount received for goodwill is appropriate, and court should also consider tax consequences to spouses resulting from differing treatment, for tax purposes, of goodwill and of covenants not to compete. I.C. § 32-712.

17. Divorce ⇐286(1)

Where court order requiring husband to remove sign from adjacent property was effective only while sale of community-owned business was pending, and sale had since been completed, propriety of removal order was moot.

18. Constitutional Law ⇐69

Court of Appeals would not issue advisory opinions.

C.J. Hamilton (argued), Hamilton & Hamilton, Steve F. Bell, Coeur d'Alene, for defendant-appellant.

Sue S. Flammia (argued), Flammia & Solomon, Scott W. Reed, Coeur d'Alene, for plaintiff-respondent.

WALTERS, Chief Judge.

This appeal involves the disposition of property following a divorce decree. The issues concern the sale of a family business ordered by the magistrate in the action the parties do not contest the division of distribution of any other assets. To resolve the parties' interests in the family business, the magistrate ordered a sale of the business and the proceeds divided between the parties. Orders by the magistrate, directing the husband to execute a sales agreement containing a covenant not to compete and to remove a sign on property adjacent to the business, were appealed by the husband to the district court. The district court affirmed. The husband appeals from the district court decision. We vacate the district court's decision in part and remand for redetermination of the value and the distribution of the business goodwill.

The issues presented on appeal may be stated as follows: (1) when a family business is sold to facilitate property distribution in a divorce, can a trial court order a spouse to agree to a noncompete clause in a sales agreement? (2) If so, can the trial court's order be enforced with a contempt proceeding? (3) What consideration should be given to the goodwill of a business ordered sold in a divorce action? (4) Can a trial court order a sign advertising a competing business to be removed from a former spouse's separate property until after the family business is sold? (5) Should either party to this appeal receive an award of attorney fees?

The background of this case is as follows. Elizabeth and Terry Carr were married in California in 1963. In 1975, the Carrs moved to Post Falls, Idaho, and purchased a one-half interest in the Husky Port Truck Stop located near Post Falls. They became sole owners of the truck stop in 1978. The business prospered under the Carrs' management; the physical plant was expanded and modernized, a shop to sell and service CB radios was added, tire and fuel sales increased, restaurant sales flourished. Terry Carr was manager of the entire operation except the restaurant, which was handled by Elizabeth. He worked twelve to fourteen hours a day at the business and was on call twenty-four hours a day. In 1979, Elizabeth Carr filed for divorce. Terry Carr counterclaimed and the cause was tried before a magistrate.

Evidence was submitted concerning the value of the assets and the amount of outstanding liabilities of the truck stop. From this evidence, the magistrate determined the business had a net worth of $761,309. The magistrate assigned no value to "goodwill," concluding that "no credible evidence was presented at trial to support a finding that the business possesses any good will upon which a value can be placed." Terry Carr was given sixty days to purchase Elizabeth Carr's community interest in the truck stop, measured by one-half its fair market value. For this purpose, the magistrate treated the net worth of the business, $761,309, as its fair market value. In the event Terry Carr did not purchase his ex-wife's interest, the magistrate ordered the property to be sold and the proceeds divided. Subsequently, Terry Carr did not purchase his ex-wife's interest in the truck stop, and efforts to sell the business to a third party commenced.

[1] Prospective purchasers insisted on a provision in the sales agreement limiting Terry Carr's ability to open a competing business. One typical noncompete clause prohibited the Carrs for five years from opening a competing business within ten miles of Husky Port Truck Stop. Because Terry Carr owned property adjacent to the truck stop, he was opposed to a noncompete clause in any sales agreement, which would interfere with his planned use of the adjacent property. The magistrate ordered Terry Carr to execute a specific earnest money agreement containing a covenant to not compete and, when he declined to do so, the magistrate held Terry Carr in contempt of court. To prevent further contempt orders, Terry Carr did subsequently sign an earnest money agreement which contained a noncompete provision.[1] The magistrate also ordered Terry Carr to remove a sign announcing a new truck stop business to open on the property adjacent to Husky Port Truck Stop. On appeal, the magistrate's orders were affirmed by the district court.

The district court, finding the noncompete covenant to be reasonable, upheld the covenant and concluded that it was within the magistrate's discretion to enter an order directing Terry Carr to agree to the noncompete provision. The district court declined to award additional compensation to Terry Carr for his agreement to not compete, by alteration of the magistrate's distribution of property or its proceeds. The district court viewed the magistrate's order to remove the sign as effective only while the sale of Husky Port was pending. The district court observed that, once the sale was completed, Terry Carr was free to replace the sign although replacement of the sign could generate an action to enforce the covenant not to compete. The magistrate's order regarding the sign was therefore upheld. The district court also upheld the magistrate's authority to enforce its orders by contempt proceedings.

[2] We turn first to the issues concerning the sale of the truck stop. Unless there are compelling reasons to divide community assets unequally, the division of community property in a divorce proceeding should be substantially equal. I.C. § 32-712. Here the magistrate found there were compelling reasons to make an unequal division of the community property owned by the parties. We have not been asked to review the propriety of that determination. In regard to the truck stop, the magistrate ordered that Elizabeth Carr should receive the first $4,846 from the proceeds of the sale of the business and the balance divided equally.

1. Elizabeth Carr contends the issues regarding the noncompetition clause became moot when Terry Carr executed the sales agreement. It is clear Terry Carr agreed to the noncompete provision only to avoid further contempt orders. In those circumstances, we hold the authority of the magistrate to order execution of the limiting clause and the subsequent finding of contempt should not bar appellate review of the issues raised herein.

[3–6] The method by which the property is distributed is left to the discretion of the trial court, *Koontz v. Koontz*, 101 Idaho 51, 607 P.2d 1325 (1980), but ordinarily the trial court should divide the community property in such a way as to give each spouse the sole and immediate control of his or her share of the property. *Parker v. Parker*, 95 Idaho 876, 522 P.2d 788 (1974). Thus, to give each spouse the immediate control of his or her share of the property, the trial court may provide for the sale of community property so long as the sale order does not amount to waste of a community asset or provide that the property be sold for less than it is worth. *Id.* The trial court in a divorce proceeding may enforce its orders regarding property distribution with contempt proceedings. *See Phillips v. District Court of the Fifth Judicial District*, 95 Idaho 404, 509 P.2d 1325 (1973).[2]

[7] In this case, the trial court ordered Terry Carr to execute an earnest money agreement containing a covenant to not compete for five years and within ten miles of Husky Port. Terry Carr subsequently was held in contempt of court for failing to sign the earnest money agreement.[3] As noted, when the magistrate made findings of the values of the various properties owned by the parties, the magistrate was not able, because of a lack of credible evidence, to assign any value to the goodwill component of the truck stop. *See Saviers v. Saviers*, 92 Idaho 117, 438 P.2d 268 (1968); *Loveland v. Loveland*, 91 Idaho 400, 422 P.2d 67 (1967) (no error where trial court failed to divide value of goodwill of community business in divorce actions when the evidence was insufficient to establish value of goodwill). Subsequently, however, because of the demands by purchasers for a covenant not to compete, we believe the existence of the goodwill achieved a much greater significance in determining an appropriate division of the parties' property interests. In effect, by ordering Terry Carr to execute the noncompetition clause, the magistrate was requiring that the goodwill of the truck stop business be sold along with the tangible assets and the accounts receivable.

> In instances where a party sells his business, and, in connection with such sale, agrees that he will not engage in the same or similar business in the same area for a particular and reasonable length of time, it is obviously the intention on the seller's part to sell the good will of the business, even though the contract, as in this instance, fails to expressly mention good will. [Citations omitted.]

Vancil v. Anderson, 71 Idaho 95, 101, 227 P.2d 74, 77 (1951). Given the trial court's authority in a divorce action to order the sale of a community business to effectuate property disposition, the issue is whether a trial court may require a business's goodwill to be included in the sale. We hold that it may.

[8] Our Supreme Court long ago recognized that the goodwill of a business "is a species of property subject to sale by the proprietor, and which may be sold by order of court...." *Harshbarger v. Eby*, 28 Idaho 753, 761, 156 P. 619, 621 (1916), quoting *Smock v. Pierson*, 68 Ind. 405, 34 Am.Rep. 269 (1879). Goodwill is an intangible business asset not easily defined.

2. Terry Carr cites *Phillips* for a broad proposition that the trial court may not issue any post-divorce orders unrelated to a former spouse's duty to support his wife or children. The proposition is erroneous. *Phillips* held the trial court's order of contempt did not violate art. 1, § 15 of the Idaho Constitution. That section prohibits imprisonment for debt. *Phillips* held an order of contempt, and subsequent imprisonment, for failure to satisfy a property settlement debt does not violate art. 1, § 15 if the debt was related to the former spouse's obligation to support his wife or children. *Phillips* does not preclude a trial court from issuing orders to effectuate a property disposition decree where the order, which might be enforced with contempt proceedings, does not direct payment of a debt.

3. The earnest money agreement signed by Terry Carr, which eventually resulted in a sale of the business contained a covenant not to compete for five years within five miles of the Husky Port Truck Stop.

The "good will" value of any business enterprise is that value which results from the probability that old customers will continue to trade or deal with members of an established concern. It is the probability that old customers will resort to the old place or seek old friends, and the likelihood of new customers being attracted to well-advertised and favorably known services or goods.

Good will is the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds or property employed therein, in consequences of the general patronage and encouragement which it receives from constant or habitual customers on account of its location, or local position or reputation for quality, skill, integrity or punctuality. It is something in business which gives reasonable expectancy of preference in the race of competition.

Good will is property, so recognized and protected by law. As such it is subject to bargain and sale. [Footnotes omitted.]

Jackson v. Caldwell, 18 Utah 2d 81, 415 P.2d 667, 670 (1966). However it is defined, goodwill clearly is property that can be sold.

[9–13] Further, goodwill of a business owned by a spouse may be community property, separate property or part community property and part separate property, depending on the circumstances. Separate property is all property owned by either spouse before marriage, and the property acquired afterward by gift, bequest, devise, or descent. I.C. § 32-903. Community property is all other property acquired after marriage by either spouse. I.C. § 32-906. Thus, to the extent it is acquired through the efforts of a spouse during marriage, the goodwill of a community owned business is community property. In this case, the Carrs did not have an interest in the truck stop until after they were married. All their labor on behalf of the business occurred during coverture. Accordingly, any goodwill value of the business was community property which should have been valued and distributed upon divorce.[4] *See Mueller v. Mueller*, 144 Cal.App.2d 245, 301 P.2d 90 (1956); *Hurley v. Hurley*, 94 N.M. 641, 615 P.2d 256 (1980); *Matter of Marriage of Fleege*, 91 Wash.2d 324, 588 P.2d 1136 (1979). The magistrate did not err by ordering Terry Carr to execute a reasonable noncompetition agreement, thereby including the goodwill in the sale of the truck stop.[5] *See Lord v. Lord*, 454 A.2d 830 (Me.1983) (trial court could order the wife to execute a reasonable noncompetition clause to protect the goodwill of a business awarded to the husband).

[14] The magistrate had initially concluded the value of Husky Port Truck Stop contained no component of goodwill. The business had not yet been sold and the proceeds divided in accordance with the magistrate's plan for distribution of the community assets, when the noncompete agreement became an issue in the divorce. As *Vancil v. Anderson, supra* indicates, the goodwill of a business is sold when the seller agrees to a noncompetition provision in the sales agreement. It is clear the purchasers here were interested in acquiring more than the real property, equipment, inventory, and accounts receivable of Husky Port Truck Stop. The purchasers also sought to purchase the business's goodwill, as is evident by their insistence upon a noncompetition clause in the sales agreement. On the record before us, we conclude that goodwill comprised a portion of the value of the truck stop and that the

4. There appears to be a split of authority as to whether the goodwill of a professional practice is a divisible or awardable asset in a divorce action. *See* ANNOT., 52 A.L.R.3d 1344 (1973). Because the case before us does not involve a professional practice, we do not decide that question today.

5. Terry Carr does not argue on appeal the distance and duration restrictions of the noncompetition clause are more than necessary to protect the truck stop's goodwill, making the clause unreasonable and thus invalid. *See Stipp v. Wallace Plating, Inc.*, 96 Idaho 5, 523 P.2d 822 (1974).

community-owned business, including its goodwill, was a community asset which should have been valued and distributed by the magistrate.

[15, 16] It remains to be determined whether the value received for goodwill should be divided equally. As already noted, the division of community property should be substantially equal unless there *are compelling reasons to divide it unequally*. Terry Carr insists that he is entitled to compensation for his agreement to not compete with the Husky Port Truck Stop. We agree that there may be compelling reasons in this case to justify an unequal division of the proceeds from the sale of the truck stop. It is clear Terry Carr was less willing than Elizabeth Carr to be restricted from opening another truck stop business. Terry Carr owned property suitable for another truck stop and he announced his intention to open a new business at the earliest opportunity. His sale of the goodwill of Husky Port Truck Stop may have significantly affected his occupation, amount and source of income, use of vocational skills, employability, and present and potential earning capability, all factors to be considered in determining whether a community property division should be equal. *See* I.C. § 32-712. When a family-owned business is sold to facilitate a property division in a divorce, we believe the trial court must consider the unique character of goodwill along with the factors in I.C. § 32-712 to determine whether the goodwill asset should be divided equally. The unique nature of goodwill, its sale by means of a noncompetition clause, its varying importance to the separate individuals of the marital community, and the effect of its sale on the section 32-712 factors may constitute compelling reasons to divide the value received for goodwill unequally. Because the magistrate did not consider the goodwill of Husky Port Truck Stop after the property was sold subject to the noncompete agreement, we vacate the property distribution decree regarding the truck stop. On remand, the trial court must determine the value received for the goodwill of the business, and must carefully consider the factors listed in I.C. § 32-712 to determine whether an unequal division of the amount received for the goodwill is appropriate. The court should also consider the tax consequences (if any) to the Carrs, vis-a-vis each other and vis-a-vis the buyer of the truck stop, resulting from differing treatment, for tax purposes, of goodwill and of covenants not to compete.

[17, 18] We decline to determine Terry Carr's contention that the magistrate erred by ordering the removal of the sign from property adjacent to the truck stop. Removal of the sign was ordered to avoid discouraging prospective vendees from making offers to purchase the truck stop. Because the removal order was effective only while the sale of Husky Port Truck Stop was pending, and the sale has since been completed, the propriety of the removal order is moot; although, as noted by the district court, *replacement of the sign may* be viewed as a breach of the noncompete agreement. Thus, our discussion of the issue would resolve no actual controversy. We decline to issue advisory opinions. *See Radermacher v. Eckert*, 63 Idaho 531, 123 P.2d 426 (1942).

Both parties seek an award of attorney fees on appeal. The award of attorney fees in a divorce action is controlled by I.C. § 32-704. Because of the remand to determine the disposition of the goodwill component of the Husky Port Truck Stop we are faced with an incomplete record upon which we can consider the factors required under I.C. § 32-704 in order to award attorney fees. Therefore, we instruct the trial court on remand to determine whether an award of attorney fees, for this appeal, should be made to either party. *See, e.g., Donndelinger v. Donndelinger*, 107 Idaho 431, 690 P.2d 366 (Ct.App.1984).

The district court's order affirming the magistrate's distribution of Husky Port Truck Stop proceeds is vacated. The cause is remanded to ascertain the proceeds attributable to the goodwill of the business and to determine an appropriate division of those proceeds. Costs to appellant, Terry Carr.

BURNETT, J., concurs.

SWANSTROM, J., dissenting in part.

I would affirm the district court's order in total. The majority remands for the trial court to redetermine the value of goodwill. However, there is no real equation which the trial court can apply to relate the value of goodwill to the amount, if any, the husband should be paid for his agreement not to compete. That is because, as the majority opinion correctly shows, goodwill is comprised of many variable components. There is no definite relationship between goodwill and a covenant not to compete unless the parties to a transaction agree both as to the value of the goodwill and the value of the covenant. This determination is not made without the participation of the buyer, as well as the sellers. Here, the sale has been completed; the purchase price fully paid.

The husband contends in the trial court that the goodwill of the business had no separate value. From evidence already presented once, the magistrate was unable to assign any separate value to goodwill. I see little to be gained by a remand on this point. The fact remains that after the trial court has made its new determination of the value of the goodwill, whether it is $1 or $100,000, there will be no additional dollars available for distribution from the sale of the community business. This is not a case where an asset was omitted from the distribution or not considered.

Finally, the husband's contention that he is entitled to a greater share of the sale proceeds because of his agreement not to compete is not convincing in light of his previous conduct. First, he took the untenable position of trying to sell the business, with the expectation of obtaining the best price, while advertising to the world his intention to open a competing business on adjoining property. Regardless of whether the business to be sold has any ascertainable goodwill value, a reasonable and prudent purchaser would not agree to pay as much—if indeed he would purchase at all—under such circumstances.

Had the husband here wanted to continue in the operation of this type of business at the same location he could have done so. The trial court allowed him every reasonable opportunity to purchase the wife's interest in the business. This included at least one opportunity to meet the bona fide offer of a prospective purchaser. The husband first said that he would and later he declined. Now, he wants to be compensated for not being able to compete in close proximity to the business he left. I am not persuaded that there is any legal or equitable grounds for a remand.

Douglas S. CLARK and Pamela J. Clark, husband and wife, Plaintiffs-Appellants,

v.

George ENNEKING, Defendant-Respondent.

No. 15149.

Court of Appeals of Idaho.

May 31, 1985.

Homeowners brought suit against contractor seeking recovery for damages allegedly sustained when contractor disrupted homeowners' sewer service. The District Court, Second Judicial District, Idaho County, George R. Reinhardt II, J., affirmed magistrate division judgment in favor of contractor, and homeowners appealed. The Court of Appeals, Walters, C.J., held that substantial competent evidence supported jury's verdict in favor of contractor.

Affirmed.

Burnett, J., concurred in the result.